Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROOSEVELT CLAY,

Petitioner,

vs.

K. COOPER, Warden,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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96 pp

(1a) QUESTIONS PRESENTED

1. Did the District Court err - in violation of this Court's holding in Miller v. Fenton, 474 U.S. 104, as followed and expanded in Thompson v. Keohane, No. 94-6615, Nov. 29, 1995 [___ U.S. ___, 58 CrL 2021] - in denying the Petition for Writ of Habeas Corpus without evidentiary hearing, upon improperly accepting as correct, the State court's findings as to "voluntariness" and "no coercion," which were not findings of fact to be presumed correct, but rather, were mixed findings of law and fact which the habeas court should have determined *de novo*:

(A) where defendant - who claimed his Illinois murder convictions were obtained in violation of his rights to

remain silent, to counsel, and to due process of law under the 5th, 6th and 14th Amendments to the U.S. Constitution, and challenged the constitutional validity of his allegedly involuntary confession, which he claimed was improperly induced by official promises of immunity during what he reasonably perceived to be plea negotiations - by **uncontroverted** affidavit attested to his coerced state of mind when confessing? ***AND***

(B) where newly discovered evidence never fairly considered by the State courts impacted on the credibility of his above claims of involuntariness and coercion, and substantiated that a prosecution witness (FBI agent) lied in State court about relevant facts?

(1b) PARTIES INVOLVED (per Rule 21.1(b)]

Petitioner, Roosevelt Clay, was the petitioner in the United States District Court for the Northern District of Illinois, Eastern Division, and appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, K. Cooper, Warden, was the respondent in the District Court, and appellee in the Court of Appeals.

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(A) where defendant - who claimed his Illinois murder convictions were obtained in violation of his rights to remain silent, to counsel, and to due process of law under the 5th, 6th and 14th Amendments to the United States Constitution, and challenged the constitutional validity of his allegedly involuntary confession, which he claimed was improperly induced by official promises of immunity during what he reasonably perceived to be plea negotiations - by **uncontroverted** affidavit attested to his coerced state of mind when confessing, ***AND***

(B) where newly discovered evidence never fairly considered by the State courts impacted on the credibility of his above claims of involuntariness and coercion, and substantiated that a prosecution witness (FBI agent) lied in State court about relevant facts.

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(1d) Judgment Below

The [Unpublished] Order of the United States court of Appeals for the Seventh Circuit, No. 94-3317, decided July 11, 1995, is attached as Appendix A to this Petition.

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Constitutional Provisions

The United States Constitution provides, in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." (5th Amend.)

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." (6th Amend.)

"No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ." (14th Amend., Sec. 1)

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ROOSEVELT CLAY,

Petitioner,

vs.

K. COOPER, Warden,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

Petitioner, Roosevelt Clay (hereafter defendant, or Clay), prays that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the 7th Circuit, affirming the judgment of the U. S. District Court, Northern District of Illinois, Eastern Division, denying his Petition for Writ of Habeas Corpus

(seeking relief from his Illinois murder convictions) without evidentiary hearing.

Judgment and Opinion Below

The unreported Order of the 7th Circuit, affirming the District Court's judgment, is set out as App. A.

Jurisdictional Statement

On July 11, 1995, the 7th Circuit filed its Order (App. A) affirming the judgment of the District Court. No Petition for Rehearing was filed. This Petition for Certiorari is timely filed per Court Clerk's letter.[1]

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[1] As per letter from Court Clerk, Oct. 18, 1995, returning petition postmarked Oct. 10, 1995 and received Oct. 12, 1995, for failure to comply with page limitation and requirement that Orders/Opinions in Appendix contain the dates filed; the corrected petition should be received by the Clerk within 60 days of Oct. 18, 1995.

Jurisdiction is invoked under 28 U.S.C. Sec. 1254(1) and Rules 10.1, 12.1 and 13.1 of this Court.

STATEMENT OF THE CASE

Defendant, Roosevelt Clay, was convicted by a jury in an Illinois court of three counts of murder and sentenced to concurrent terms of 60-180 years. After the Illinois Appellate Court affirmed, People v. Clay, 211 Ill.App. 3d 291, 570 N.E.2d 335 (1 Dist. 1990), and denied rehearing, and the Illinois Supreme Court denied leave to appeal, No. 71938, Clay filed his Petition for Writ of Habeas Corpus (HR 1-1),[2] with

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[2] References to "R." are to the Record in [consol.] appeal Nos. 1-88-2187 & 1-89-3115, in the Illinois Appellate Court; "HR" refers to the Record on Appeal in the federal habeas proceedings; and "App." refers to pages of the Appendix to this Petition.

supporting Memorandum. (HR 2-1) The State filed its Answer (HR 11) with supporting Memorandum. (HR 16) The State did not file any Affidavits in opposition to Clay's averments, submitting in support of its Answer to the Petition, material of a documentary nature - Clay's Brief in the Appellate Court, the Appellate Court opinion, and Clay's Petition for Leave to Appeal). (Exs. A, B and C attached to HR 11.)

The State conceded that Clay had exhausted his State remedies. (HR 11)

The District Court (App. B) denied the Petition on the pleadings without a hearing. (HR 17, 19; App. 23) The Court of Appeals affirmed. (App. A; App. 1)

Basis for Federal Jurisdiction

Jurisdiction in the District Court

is based on 28 U.S.C. § 2254(a).

Statement of Facts

In his verified [HR 1-1, p. 23 & HR 1-1, Ex. I] Petition for Writ of Habeas Corpus (R. 1-1), Clay alleged:

"Ground one: Defendant stands convicted and imprisoned on the basis of an involuntary confession improperly and unconstitutionally obtained in violation of his federally guaranteed constitutional rights to due process of law, to counsel, and to not incriminate himself, where it was made in reliance on an FBI agent's promise that he would not be prosecuted." (R. 1-1, p. 7)

"Ground two: The court's dismissal of defendant's motion for new trial based on newly discovered evidence without a hearing deprived defendant of due process of law, where the newly discovered evidence not only proves [as per defendant's motion and trial testimony] that defendant's statements were made while plea discussions were underway, but also absolutely impeaches the FBI agent on matters crucial to the motion to suppress." (R. 1-1, p. 19)

In support, Clay attached his Affidavit, averring that his statements

were made in reliance on the FBI's false promises [as detailed below]. (HR 1-1, Ex. I) Clay's Affidavit avers [in part]:

> "... [T]he facts contained ... [in the Petition] are true and correct, to the best of my knowledge, information and belief.
> ... [T]he statements I gave, which were used against me in ... [my Illinois murder] trial, I gave only as a direct result of promises made to me by the FBI, through its agent, Scott Jennings, that anything I told him would not be used against me in any criminal proceeding, State or federal.
> I would not have made any statements incriminating me in any homicide, but for the promises made to me by Scott Jennings in his official role as FBI agent." (R. H1-1, Ex. I)

The Petition alleges (*inter alia*):

The botched kidnapping of a doctor and two of his patients in 1975 ended with their deaths. Days later, Clay surrendered to police, was placed in a line-up, questioned and appeared before

a grand jury, all in the presence of his lawyer. He refused to answer questions or testify and was released. (R. 16-17)

Eight years later, in 1983, while under [Illinois] indictment for two armed robberies and - with a 4-page criminal history sheet (R. 61), worried about consecutive and extended term sentences (R. 49) - Clay wanted to make a deal (R. 48); he arranged a meeting with FBI agents,[3] and offered to provide information of interest to the FBI in exchange for help in receiving minimum, concurrent sentences on the Illinois armed robberies. (R. 20-21, 48,

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[3] Clay said he did not go to the Chicago Police with this information because of the organized crime connections of one of the persons he was to give information about (R. 50, 90) and that subject's close ties with certain Chicago police officers. (R. 19)

74, 90, 113, 349)

Admonished by the FBI to disclose his past criminal activities without fear of prosecution in order to protect his credibility and avoid surprise and embarrassment to the federal prosecutor during a trial (R. 51, 110, 122), Clay gave numerous statements implicating himself in state and federal offenses,[4] including a Wisconsin homicide and the instant Illinois 1975 triple homicide.

Clay was indicted (in Chicago, Cook County, Illinois) in 1984 for the triple homicides and tried in 1988 by a jury, after the FBI [Jennings] told the Chicago Police that Clay had confessed to the triple homicide. Jennings

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[4] Clay was never prosecuted for the federal offenses disclosed by his admissions.

testified against Clay at his triple homicide trial.[5]

While the trial evidence, which included Clay's confessions, was sufficient to convict, Clay disputes the constitutional admissibility of his confessions.[6]

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[5] Further, Jennings never told the prosecutors on the State armed robbery cases that Clay had been cooperating with the FBI (R. 116-117, 129), and failed to follow those cases as promised. (R. 129)

[6] The District Court held:

> "... [A]ny rational trier of fact could have found Clay guilty of murder based on the evidence presented and that the newly discovered evidence would not have led to a different result." (App. 54)

This is not the issue; we do not contest that the evidence rationally supports the murder conviction, but challenge the voluntariness of Clay's confession, and demonstrate that the new evidence would have led to a different result (on the motion to suppress) as to voluntariness.

The "kernel" of Clay's claim is that **the FBI made false promises that induced him to give the information at issue - that is, that his statements were involuntary and coerced**. Clay and his attorney[7] so testified at the motion hearing; Jennings denied any promises. (App. 30-36) Jennings warned that Clay had to "come clean" (R. 51) and be

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[7] "Clay's attorney, Michael Goggins, testified at the hearing on the motion to suppress that Jennings did promise Clay, as well as Goggins, that he would inform prosecutors that the defendant was cooperating, but then failed to do so. Goggins further testified that Clay told him that he had been assured that he would not be charged with any crime about which he was telling the FBI." (App. 35-36)

Jennings told Goggins that Clay was continuing to cooperate, that he was an excellent witness (before a federal grand jury), and that Jennings would duly communicate this to the [Illinois] prosecutors. (R. 150-51)

candid (R. 122) about his past and present criminal activities. (R. 110) When Clay's attorney asked:

> "If he [Clay] tells you about it [his prior crimes] what you're telling him, if you are frank with us and tell us about it and we don't catch you at it we won't prosecute you, is that right"? (R. 18)

Agent Jennings' answered:

> "That's correct and I said fully cooperative and tell us fully what you are involved in in the past and not have anything jump up that you didn't tell us about, you can be prosecuted. **This gets to the trial stage we have you as a witness and you didn't tell us about some crime you committed years ago you are going to be fully prosecuted for this.**" (R. 118-19) (Emphasis added.)

At the Motion hearing, Jennings first testified he never promised to help Clay on any state cases. (R. 103-04) He denied telling Clay that his cooperation would be made known if and when he was sentenced. (R. 141-42) But

when shown his own report covering his first meeting with Clay on April 23, 1983, Jennings read, from his report:

> "It was explained to Clay by interviewing agents that no promises could be made to him. It was pointed out that if in fact he cooperated with the FBI in investigations it would be made known to the appropriate individuals if and when he was sentenced, period." (R. 141-44)

Jennings admitted his recollection was refreshed by his report. (R. 144)

Jennings admitted that Clay began to "tell us things." (R. 107) Clay delivered.[8]

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[8] Relying on Jennings' promises: Clay testified before a federal grand jury (see p. 15, infra); he told the FBI about drug trafficking (R. 109-11), stolen vehicles (R. 20), and his own possession of a bomb (R. 51); three times, Clay wore a "wire" and, under FBI direction and supervision, met or attempted to meet with persons, once delivering marked money. (R. 21-23)

Clay denied being read his Miranda rights by the agents at the jail but said he signed forms that he did not read. He estimated he had signed 20 forms during his cooperation with the FBI agents. (R. 55-57) Jennings claimed he advised Clay orally about the Miranda rights on June 13, 1983, but did not read them verbatim (R. 96), although Clay signed the waiver form. (R. 98)

Clay provided details about a murder in Wisconsin (R. 33), identified the shooter as Willie Carter [who had allegedly tried to rape Clay's girlfriend (R. 97)], and implicated himself in the crime. (R. 99) Clay told the agents about the triple homicide in 1975, again named Carter as the shooter, and again implicated himself. (R. 100)

After Clay made the statements, the agent told him, **for the first time**, that he could be prosecuted. (R. 101) Clay testified that until then, he did not know they could use the information against him. (R. 59)

Jennings testified that before going into the facts and circumstances of the Wisconsin and Chicago murders, he had no discussion with Clay concerning any deal; no conversation about plea bargaining or any promises of any sort. (R. 98-100) More precisely, when questioned by the State, he swore:

> Q. "Now, prior to going into the facts and circumstances of what Mr. Clay wanted to talk about did you have any conversations with him concerning any deals at that point?"
>
> A. "No, I did not." (R. 98)

Q. "Was there any discussion about plea bargaining before that conversation took place?"

A. "No, there wasn't." (R. 98-99)

Q. "Was there any discussion about any plea bargaining about that case?"

A. "No." (R. 100)[9]

Jennings considered Clay's murder confessions part of his cooperation (R. 139), which cooperation Jennings called "successful" (R. 367), and he continued to accept information from Clay. (R. 383, 386) (See fn. 8, p. 12, supra.)

Clay's cooperation included testifying before a federal grand jury. When a grand juror asked why he was cooperating, Clay said he was doing it to get a lighter sentence. (R. 37)

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[9] The newly-discovered evidence (discussed below) directly impeaches Jennings as to these answers.

When the FBI finished with Clay, Jennings notified the Chicago Police that he had confessed to the triple homicide (R. 101) and arranged for Chicago police officers to interview Clay on August 29, 1983, at the MCC. (R. 102) One of these Chicago officers testified at trial that Jennings and Clay were on a first-name basis. (R. 843)

Clay was sentenced to 9 years on the armed robbery. (R. 42) He had expected 6 years. (R. 160) He later pleaded guilty to the remaining armed robbery for 9 years concurrent. (R. 42)

Trial Court's Findings

In denying Clay's Motion to Suppress statements - rejecting Clay's position that they were plea-related and otherwise involuntary - the court stated

that while there might be an argument that Clay made statements to get a lesser sentence, there was also an argument that Clay was trying to get the man or men against whom he was giving information. The court said there was no objective way to categorize what transpired as plea negotiations, plea agreements or plea discussions.

THE NEWLY DISCOVERED EVIDENCE

In the summer of 1989, a year after Clay's triple murder conviction, his Wisconsin lawyers were preparing for his trial in Waukesha, Wisconsin. During the investigation they interviewed retired Waukesha, Wisconsin, police captain Richard Sader,[10] and

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[10] A copy of an investigator's report dated April 25, 1989, of an interview with Richard D. Sader on April

discovered a 2-page police report (Ex. A to Motion for New Trial, R. 78), which had been prepared at his direction 6 years earlier, on June 13, 1983.[11] This report related a telephone call Sader received from agent Jennings on June 7, 1983. On June 6, 1983, Jennings had received a call from Clay from the Cook County Jail in which Clay offered more information to Jennings in exchange for help on his Illinois cases. (R. 94)

Per Sader's report, Jennings said:

> **"This black male [Roosevelt Clay] was in the process of attempting to arrange a deal to lessen [armed robbery] charges against him and in turn was to supply information as to the party or parties responsible**

24, 1989, was attached to the Petition as Ex. II.

[11] A copy of the Motion for New Trial, which includes this Exhibit, was attached to the Petition as Ex. III.

> **for the Ernest Kamrath [Wisconsin] shooting . . . and that he [Clay] is about to take down other persons responsible for various crimes, either in which he was personally involved or has knowledge."** (Ex. A to Motion for New Trial, R. 78) (Emphasis added.)

Per the report, agent Jennings had suggested that Captain Sader bring the Waukesha County District Attorney or someone from his office down (to Chicago), to "arrange some type of deal" for Clay on the Wisconsin homicide.

In late 1989, during Clay's Wisconsin Motion to Suppress, Sader testified that the contents of the 1983 police report were true. (Ex. B, Motion for New Trial; Ex. III to Petition.)

On July 24, 1989, Clay filed a Motion For New Trial (Ex. III), asserting recent discovery of Richard Sader and the 6-year-old police report,

alleging that none of the discovery material subpoenaed by Illinois counsel from the FBI had referred to Jennings' telephone conversation with Sader, and that **Sader's testimony would prove that Clay and the FBI agent had been engaged in plea discussions in Illinois the week before Clay gave information about the triple homicide in Illinois - despite agent Jennings' testimony to the contrary at Clay's trial.** (R. 98-100)

Before the court ruled on the State's Motion to Dismiss, Clay supplemented his Motion for New Trial with a portion of the transcript of Jennings' 1989 testimony in the Wisconsin trial. There, concerning his discussions with Clay before the June 13, 1983 interview at the jail, agent

Jennings was asked:

> "... did Roosevelt Clay indicate to you that he was trying to work out a deal to lessen charges and wanted your help?"
>
> Jennings answered, "Yes, sir." (Ex. B, Motion for New Trial, R. 78)

Clay's Motion for New Trial alleged that the newly discovered evidence **corroborated Clay's testimony** and **directly impeached Jennings' testimony** on the critical issue of **whether plea negotiations were ongoing** on June 6, 1983, when Clay proffered additional information to the FBI during the call from the Cook County Jail.

The court denied relief **without evidentiary hearing**, stating that although the evidence showed that Clay had a subjective expectation to negotiate a plea, his expectation was

unreasonable. Clay, 570 N.E.2d at 344.

REASONS FOR GRANTING CERTIORARI

1. The District Court's Judgment violates the constitutional principle of Miller v. Fenton, 474 U.S. 104, as followed and expanded in Thompson v. Keohane, No. 94-6615, Nov. 29, 1995 [___ U.S. ___, 58 CrL 2021]; because that court improperly accepted as correct, the State court's findings as to "voluntariness" and "no coercion," which are not findings of fact to be presumed correct, but rather, mixed findings of law and fact which the habeas court must determine *de novo*.

2. The Court erred in denying the Petition without evidentiary hearing:

(A) where defendant - who claimed his convictions were obtained in violation of his 5th, 6th and 14th Amendment rights on the basis of his involuntary confessions (which he claimed were improperly induced by false FBI promises of immunity during what he reasonably perceived to be plea negotiations) - by uncontroverted affidavit attested to his coerced state of mind when confessing, AND

(B) where newly discovered evidence not fairly considered by the State courts impacted on the credibility of his above claim of coercion, and substantiated that a prosecution witness (FBI agent) lied about facts relevant to coercion.

CERTIORARI SHOULD BE ALLOWED

(I) To enforce compliance with the constitutional principle that State court findings on "voluntariness" are not entitled to a presumption of correctness;

(II) To clarify that contested factual issues bearing on voluntariness may not be resolved in habeas proceedings without evidentiary hearing, where the petition and uncontradicted affidavit support the claims of constitutional violations.

The District Court resolved on the bare pleadings, factual matters crucial to the issue of voluntariness - although Clay averred his statements were induced by coercion in the course of what he perceived to be a plea bargaining situation,[12] and made serious allegations - documented by physical

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[12] Whether or not plea negotiations were in fact in progress, the crucial issue is Clay's reasonable belief that they were, even if they were not, where such belief was, per his **uncontradicted** averments in the habeas Affidavit, directly induced by Agent Jennings.

evidence made and preserved by police officials - that the voluntariness of his statements was **not** appropriately resolved in the State trial or appeal proceedings, due to false testimony by agent Jennings, a functionary of the federal government - and where the newly discovered evidence directly impeaches the said FBI agent.[13]

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[13] Jennings' testimony that no plea negotiations were underway when Clay's statements were made, and that no promises were made that he would not be prosecuted - which testimony of Jennings obviously was believed by the trial court in denying the motion to suppress - was shown to be false by the newly-discovered evidence. When the new evidence is considered together with the pre-trial and trial evidence, it is no longer rationally possible to conclude that Clay's statement was voluntary:

> "[C]ertain promises, if not kept, are so attractive that they render a resulting confession involuntary. See, e.g., United States v. Shears, 762 F.2d 397, 402 (4 Cir. 1985) A promise . . . that any statement will not be used against the

Whether Clay knowingly waived his 5th, 6th and 14th Amendment rights, and whether his confessions are voluntary, are mixed questions of law and fact that are not entitled to any presumption of correctness. The habeas court must consider all information re voluntariness of a challenged confession,[14] and must determine voluntariness in a plenary (not

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> accused is such a promise.... Under these principles, Streetman's allegations, if true, establish the very sort of official overbearing found by the Supreme Court to violate the due process voluntariness requirement." Streetman v. Lynaugh, 812 F.2d 950, 957 (5 Cir. 1987) (reversing and remanding for a full evidentiary hearing).

[14] All available evidence, including that brought out at trial, must be considered in reviewing denial of a constitutionally-based motion to suppress. Gouled v. United States, 255 U.S. 298, 313 (1921); DiBella v. United States, 369 U.S. 121, 129 (1962).

summary) fashion, *de novo* as opposed to by relying on the State court's findings. Miller v. Fenton, 474 U.S. 104 (1985)[15]; Arizona v. Fulminante, 499 U.S. 279, 287 (1991); Mincey v. Arizona, 437 U.S. 385, 398 (1978); Weidner v. Thieret, 866 F.2d 958 (7 Cir. 1989); see Thompson v. Keohane, No. 94-6615, Nov. 29, 1995 [___ U.S. ___, 58 CrL 2021] (extending Miller v. Fenton; whether suspect "in custody" for Miranda purposes, not a factual finding entitled to deference).

The federal courts here have simply rubber-stamped and perpetuated the unconstitutional findings of the state

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[15] "[T]he ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution is a matter for independent federal determination." Id. at 112.

courts. No court has yet focused on the real issue - Clay's actual mental state.

The District Court stated,

> "this court has no license to redetermine the credibility of witnesses whose demeanor has been observed by state trial court but not by this court." (App. 45)

That is precisely why an evidentiary hearing should have been held here, where the new evidence that was never duly considered by the State courts, corroborated Clay and directly impeached Agent Jennings on matters directly affecting voluntariness. The habeas court, in these circumstances, had an obligation to assess credibility anew.

The District Court further stated:

> "[C]lay did present this evidence to the trial court after he filed his motion for a new trial. The trial court carefully examined this new evidence and denied the motion for a new trial. Therefore, the

> trial court did have an opportunity to review this evidence." (App. 52)

But the State court's misperception of the actual issue, and its failure ever to determine that true issue - that is, coercion; Clay's state of mind - invalidates its conclusions. Thus, evidentiary hearing was required. See Rosenwald v. United States, 898 F.2d 585, 588 (7 Cir. 1990); Townsend v. Sain, 372 U.S. 293 (1963); McCoy v. Wainwright, 804 F.2d 1196 (11 Cir. 1986); accord, Weidner v. Thieret, supra at 963[16]; Buenoano v. Singletary, 963

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[16] Weidner recognized that **official misrepresentations are constitutionally impermissible when they "prevent the person being questioned from making a rational choice,"** ibid. (emphasis added), citing Barrera v. Young, 794 F.2d 1264, 1270 (7 Cir. 1986), and Reddix v. Thigpen, 805 F.2d 506, 516 (5 Cir. 1986). Weidner continued:

F.2d 1433 (11 Cir. 1992) (habeas court must accept petitioner's alleged facts as true[17] in determining whether allegations require hearing; obligation to hold hearing not satisfied unless defendant allowed to present evidence).

Newly-discovered evidence warrants habeas relief where "'it bears upon the constitutionality of the petitioner's detention.'" Cornell v. Nix, 921 F.2d 769, 771 (8 Cir. 1990), quoting from Byrd v. Armontrout, 880 F.2d 1, 8 (8

> "Misrepresentations can do this [i.e., prevent the person from making a rational choice], by distorting the alternatives among which the person under interrogation is being asked to choose . . . ." 866 F.2d at 963.

[17] Here, Clay has averred facts, not controverted by any sworn submission by the State, supporting his position.

Cir. 1989). Here, the new evidence bears directly on the voluntariness of Clay's confessions. Moreover, here, the new evidence so contradicts the testimony of the federal agent as to the central constitutional question, that no court, rationally, could deny Clay's motion to suppress in the face of the totality of the now-available evidence.

C O N C L U S I O N

Certiorari should be allowed, and the judgment should be reversed; alternatively, remanded with directions.

Respectfully submitted,

CONSTANTINE P. XINOS
Attorney for Petitioner

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
ARGUED June 13, 1995

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge

ROOSEVELT CLAY,
Petitioner-Appellant

No. 94-3317 v.

K. COOPER, Warden,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 94 C 327
Wayne R. Andersen, Judge.

O R D E R *[filed July 11, 1995]*

Petitioner Roosevelt Clay appeals the denial, without a hearing, of his petition for writ of habeas corpus challenging his state court conviction or three counts of murder. Clay argues that the district court erred in denying

his petition without holding an evidentiary hearing to review (1) Clay's allegations that he was convicted on the basis of involuntary confessions and (2) "newly discovered" evidence which the state *[p. 2]* trial court considered but concluded would not have changed its decision to suppress Clay's confessions. Because Clay's petition failed to allege facts other than those already in the record or to demonstrate that he was denied a fair opportunity to present his case in the state courts, we affirm the district court's determination that a federal evidentiary hearing was not warranted.

BACKGROUND

The facts surrounding Clay's confessions and state court proceedings

are detailed in the opinion of the Illinois Appellate Court in People v. Clay, 211 Ill. App. 3d 291, 570 N.E.2d 335 (1st Dist. 1990).

In 1975, Clay was subpoenaed to appear before a Cook County grand jury regarding the murder of three persons in Chicago, Dr. Lawrence Gluckman and his two patients, Tressie Harris and Minnie Harris. Clay testified that he had no knowledge about the killings of the three individuals. He was not charged.

In early 1983, Clay was named as defendant in two armed robbery cases pending in two different courts in Cook County. In February 1993, in an effort to prove that he was framed for the first armed robbery, Clay phoned the Federal Bureau of Investigation (FBI) in

Chicago, and agreed to furnish them with information about three individuals, Chuck Renzeno, Mike Switek, and Willie Carter, who he believed had set him up. Although Clay provided the FBI with information about drug trafficking, the information was not supplied as part of any plea negotiations. *[page 3]*

In May 1983, a jury found Clay guilty of the first of the two armed robbery charges. Within the next few weeks. Clay phoned the FBI again and asked if they would help him. Clay maintained that he continued to cooperate with the FBI because agents told him they would aid in his effort to receive a concurrent minimum sentence of sic years for both armed robbery charges when he pled guilty to the second armed

robbery. Clay contended that the FBI told him that he had to provide information on something of interest to state authorities in order for the FBI to help him out on the second armed robbery charge.

On June 6, while in custody, Clay p-honed the FBI again. He informed them that he could provide them with information about a murder that took place in Wisconsin in 1982. Clay testified that it was at this time that he entered into plea negotiations with the FBI to get concurrent sentences for the two armed robberies. The state contended that Clay voluntarily supplied information about the Wisconsin murder.

Clay's Confessions

On June 13, 1983, two FBI agents,

including Scott Jennings, went to the Cook County Jail to interview Clay. They read Clay his Miranda rights and had him sigh a waiver of rights form. Clay told the agents that he was involved in a homicide in Wisconsin and a triple homicide in Chicago. This meeting marked the first occasion that Clay told the FBI about the Chicago murders. He testified that, before he furnished the FBI with this information, the FBI agreed to arrange that he receive *[page 4]* concurrent, minimum sentences on the state armed robberies. Clay testified that the only reason he told the FBI about the murders after eight years "was to make a deal. . . . The deal on concurrent time. I was facing consecutive time. I just got

found guilty for one armed robbery." On cross-examination, however, Clay admitted that, before he contacted the FBI on June 6, he learned that Willie Carter had raped or attempted to rape the mother of his two-year-old son. Clay admitted that he was angry at Carter and wanted to get even. The state contended that this was Clay's motivation for inculpating himself and Carter in the murders.

Jennings subsequently arranged for Clay to talk with two Chicago police officers involved in the homicide investigation. On August 29, 1983, Clay repeated the information about the murders to the police officers. Clay conceded at trial that these officers advised him of his rights and told him

that they could make no promises.

In December 1983, Clay was sentenced to nine years in prison for the first armed robbery conviction. No FBI agent spoke on his behalf at the sentencing hearing. In January 1984, Clay pled guilty to the second armed robbery charge and received a second nine-year sentence to run concurrently with the first nine-year term.

Clay's Prosecution for the Three Chicago Murders

In September 1984, Clay was indicted for the three 1975 murders in Chicago. Before trial, in May 1988, Clay moved to *[page 5]* suppress the statements that he had made in June and August 1983 to the FBI and Chicago police officers, implicating him and others in the triple murder. After

hearing arguments and testimony, the state trial court denied Clay's motion to suppress. The court found that Clay was told on several occasions that the FBI could make no promises or deals but would advise the prosecutors of his cooperation if he did choose to cooperate. The trial court found Clay's statements to be voluntary:

> [W]hile there might be an argument made that these statements were made by Mr. Clay to get a lesser sentence[,] [t]here might also be an argument made that those statements were made by the defendant to get Mr. Switek and Mr. Carter. . . . [T]here is no objective way that we can categorize what transpired here as plea negotiations or plea agreements or plea discussions. He was told time and time again that there were no deals, that the FBI could make no deals. The Chicago Police Department advised him at least one time . . . they could make no deals. He was admonished. He signed a waiver indicating that there were no deals. These

> discussions, in the court's mind, cannot under any reading of the facts in this case be called plea negotiations. There was no coercion. There was no promise. The statements were voluntary.

(Tr. of Motion to Suppress Statement of 5/2/88, at 199-200.)

The case proceeded to trial, and a jury found Clay guilty of the murders of Dr. Gluckman and his two patients. Clay was sentenced to three concurrent terms of 60 to 180 years in prison.

Clay's Motion for a New Trial Based on Newly Discovered Evidence

In 1989, while his appeal was pending, Clay was indicted for the 1982 murder in Wisconsin about which he had told the FBI agents. During preparation for his trial in Wisconsin, Clay learned that Waukesha, Wisconsin police chief Richard Sader had *[page 6]* spoken with

Agent Jennings about the Wisconsin murder on June 6, 1983, the same day that Clay first admitted to Jennings that he had participated in the crime. Clay also learned that Sader had prepared a police report describing the contents of this conversation with Jennings. According to the report. Jennings told Sader on June 6, 1983, that "they had a black male in custody who they believed might be responsible for the murder of Ernest Kamrath . . ." The report stated further that [t]his black male was in the process of attempting to arrange a deal to lessen charges against him and in turn was to supply information as to the party or parties responsible for the Ernest Kamrath shooting."

Clay contended that this information constituted newly discovered evidence, and moved for a new trial. Clay argued that this information demonstrated that Clay and Jennings had engaged in plead negotiations in Illinois one week before Clay confessed to the triple homicide in Chicago. Had this evidence been presented to the court during the pretrial suppression hearing, Clay continued, the court probably would not have admitted his confessions into evidence.[1] The trial

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[1] Clay also supplemented his motion for new trial with a transcript of testimony given by Jennings in September 1989 during Clay's trial for the 1982 Wisconsin murder. At this trial, Jennings was asked, "And did Roosevelt Clay indicate to you that he was trying to work out a deal to lessen charges and wanted your help?" Jennings responded, "Yes, sir." Clay suggests that this testimony further corroborates his position that plea negotiations were ongoing when he made his confessions.

court denied Clay's *[page 7]* motion for a new trial. It held that the new evidence would not have affected its ruling on Clay's motion to suppress.

In a consolidated appeal, Clay challenged both the 1988 triple murder conviction and the ruling denying a new trial based on the newly discovered evidence. The appellate court affirmed the judgment of the trial court and found no abuse of discretion in the denial of Clay's motion for a new trial. People v. Clay, 211 Ill. App. 3d 291, 570 N.E.2d 335 (1st Dist. 1990). After the Illinois Appellate Court denied rehearing, and the Illinois Supreme Court denied leave to appeal, Clay filed his petition for writ of habeas corpus.

The district court denied Clay's

petition. It concluded that neither the FBI nor the Chicago police officers promised Clay that he would not be prosecuted for the triple murder in Chicago, and that Clay's confessions were therefore voluntary. The district court also held that the newly discovered evidence would not have led to a different result. Clay appeals.

DISCUSSION

I. Denial of Evidentiary Hearing on Clay's Confessions

Clay's principal argument on appeal is that the district court erred in denying his petition without holding an evidentiary hearing on the voluntariness of his confessions. His 39-page brief, however, fails to specify why a federal evidentiary hearing is warranted. The determination of whether an evidentiary

hearing is warranted involves application of a two-pronged test. First the petitioner bears the burden of *[page 8]* "alleg[ing] facts which, if proved, would entitled him to relief." Townsend v. Sain, 372 U.S. 293, 312 (1963), overruled in part by Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992). If the petitioner satisfies this burden, then an evidentiary hearing is mandated "'if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceedings.'" Resnover v. Pearson,. 965 F.2d 1453, 1456 n.2 (7th Cir. 1992) (quoting Townsend, 372 U.S. at 312), cert. denied, 113 S. Ct. 2935 (1993); see also Keeney, 504 U.S. at 10.

In denying Clay's request for an evidentiary hearing, the district court explained that the state record provided all the information needed for a satisfactory determination of the issues raised in Clay's petition. "The state record," the court noted, "includes all the necessary evidence to determine whether Clay's confession was involuntary, including both Jennings' testimony at the Wisconsin trial and the Waukesha police report." Clay v. Cooper, No. 94 C 327, slip op. at 12.

We agree with the district court's conclusion not to grant an evidentiary hearing. First, Clay has no alleged any specific facts that would entitled him to relief other than the facts adduced

at the state court proceedings.[2] Nor can Clay satisfy *[page 9]* the second prong of the test for an evidentiary hearing; he had a fair opportunity to present his case in state court proceedings, and the determinations in

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[2] See Rosenwald v. United States, 898 F.2d 585, 588 (7th Cir. 1990) (remanded for evidentiary hearing because important issues of fact involving legal ethics were not adequately developed at trial); Weidner, 866 F.2d at 963 ("[w]e are reluctant to decide a difficult question on hypothetical facts"; habeas petitioner entitled to hearing on issue of whether his confession had been coerced); Smith v. Duckworth, 856 F.2d 909. 913 (7th Cir. 1988) (remanded for evidentiary hearing because evidence in record was insufficient to determine effect of petitioner's unlawful incarceration on voluntariness of his confession); cf. Matta-Ballesteros v. Henman, 896 F.2d 255, 258 (7th Cir.) ("[A]n evidentiary hearing is not necessary when the facts essential to consideration of the constitutional issue are already before the court."), cert. denied, 498 U.S. 878 (1990).

those proceedings are supported by the record. At trial, it was shown that Clay was the one who contacted the FBI with information of a murder, motivated possibly by his desire to get even with Willie Carter; he was fully advised of his Miranda rights; he signed a waiver of rights form; and he agreed to make a statement. The district court did not err in denying Clay an evidentiary hearing on voluntariness.

II. Denial of Evidentiary Hearing on Clay's "Newly Discovered" Evidence

Clay also argues that the district court erred in refusing to hold an evidentiary hearing regarding the "newly discovered" evidence which surfaced at the time of the Wisconsin murder trial. Clay contends that this evidence would serve (1) to prove that plea discussions

were underway when he made his confessions and (2) to impeach Agent Jennings on his recollection of these events.

As a general rule, newly discovered evidence that relates only to the petitioner's guilt or innocence is not reviewable by a federal court on a motion for habeas corpus relief. Herrera v. *[page 10]* Collins, 113 S. Ct. 853, 860 (1993); Townsend, 372 U.S. at 317. Federal courts may take newly discovered evidence into account only to the extent that it bears upon the petitioner's constitutional claims. Milone v. Camp, 22 F.3d 693, 701 (7th Cir. 1994) (citing Herrera, 113 S. Ct. at 860), cert. denied, 115 S. Ct. 720 (1995). It is not enough, however, that

the evidence be "newly discovered" and relate to a constitutional violation; the petitioner must also show that the newly discovered evidence would probably have resulted in an acquittal. Coogan v. McCaughtry, 958 F.2d 793, 802 (7th Cir.), cert. denied, 113 S. Ct. 495 (1992).

We agree with the district court's decision to reject Clay's plea for an evidentiary hearing based on this "newly discovered" evidence. "Newly discovered" evidence refers to evidence which "'the petitioner reasonably either did not know about . . . or could not have presented . . . it at an earlier proceeding.'" United States ex rel. Shore v. O'Leary, 833 F.2d 663, 669 (7th Cir. 1987) (quoting Townsend, 372 U.S.

at 317). Here, Clay presented the evidence to the state trial court with his motion for a new trial. The trial court carefully examined this evidence in deciding to deny Clay's motion for a new trial. The Illinois Appellate Court subsequently concluded that the trial court acted within its discretion in denying the motion for a new trial. Because the state record included all the evidence necessary to determine whether Clay's confessions were involuntary, including both Jennings' testimony at the Wisconsin *[page 11]* trial and the Waukesha police report, a federal evidentiary hearing was not necessary. Finally, we cannot say that the state trial court committed constitutional error in determining that the

information was not so substantial that it would have resulted in Clay's acquittal.

Conclusion

Because Clay's petition for habeas relief failed to allege new facts or the denial of a fair opportunity to present his case during the state proceedings, the district court committed no error in concluding that a federal evidentiary hearing was not warranted. The district court also correctly decided that Clay is not entitled to an evidentiary hearing on his "newly discovered" evidence because the state courts carefully considered such evidence. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. ROOSEVELT CLAY, Petitioner,	)	
v.	)	Judge Wayne R. Andersen
K. COOPER, Warden, Respondent.	)	No. 94 C 327

MEMORANDUM, OPINION AND ORDER

[filed Aug. 9, 1994]

Petitioner Roosevelt Clay ("Clay") has brought this petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. For the reasons stated below, we deny the petition for writ of habeas corpus.

FACTS

The following facts are taken from the opinion of the Illinois Appellate court in People v. Clay, 570 N.E.2d 335 (Ill.App. 1 Dist. 1990).

On May 10, 1988, following a jury trial, Clay was convicted in the Circuit Court of Cook County of the murders of three individuals, Dr. Lawrence Gluckman, Minnie Harris, and Tressie Harris, in Chicago. (Judge Karnezis, presiding). Prior to his conviction, Clay made a motion to suppress statements that he had made in 1983 to members of the Chicago Police Department and the Federal Bureau of Investigation (FBI), which inculpated him and others in the triple murder in Chicago. Clay argued that these statements were made during plea negotiations and, as such, were inadmissible at trial under Supreme Court Rule 402(f). On May 2, 1989, the court heard testimony and arguments on Clay's motion to suppress his *[page 2]*

statements. At the hearing on the motion to suppress, Clay testified that in 1983 he was the defendant in two armed robbery cases pending in two different courts in Cook County. In February of 1983, after he was released on bond for the armed robbery charges, Clay phoned the FBI in Chicago and agreed to provide them with information on three individuals, Chuck Renzeno, Mike Switek, and WIllie Carter, whom he believed set him up on the armed robberies. Clay testified that he did this because he wanted to prove that he had nothing to do with the robberies. He further testified that the FBI "wanted to brief me all that I knew, and they told me that they will help. They give me continuances as long as it takes

to do this and at the end they make it be known that cooperation and try to get me less time as possible. It was Clay's understanding that the FBI would have his case delayed in court as long as he provided them with information on drug running and other criminal activity.

Clay testified that on May 17, 1983 he learned that his case for the first armed robbery charge was set for trial that same day despite assurances by the FBI that the case would be continued until they could gather a sufficient amount of information from him. Clay phoned an FBI agent named Ross Rice who spoke to Clay's lawyer. Clay testified that he heard his lawyer say: "Whatever you guys are going to do, you better come on and do it because we are going

to trial." Clay was convicted of the first armed robbery charge on that day, May 17, 1983.

On June 6, 1983, while in jail, Clay phoned the FBI to see if they could help him obtain concurrent sentences if he were convicted of the second armed robbery charge. Clay testified that the FBI told him several times that they needed to "give the state something," and that is he could give the state something the FBI would get him out. Clay informed the FBI that he could provide them with information about a murder that took place in Wisconsin in 1982. *[page 3]* On cross-examination, Clay testified that it was at this time that he entered into plea negotiations with the FBI to get concurrent sentences

for the two armed robberies.

On June 13, 1993 *[sic.]*, two FBI agents, one of whom was Scott D. Jennings ("Jennings"), went to the Cook County jail to interview Clay. Clay testified that he told the agents that he was involve in homicides in both Chicago and Wisconsin. He denied being read his Miranda rights before he spoke but admitted signing a written waiver of his rights. He denied that he read the waiver but acknowledged that he can read. He testified that before he gave the FBI information about the murders, the FBI agents agreed to see to it that he receive concurrent, minimum sentences on the state armed robberies. Clay testified that the only reason he told the FBI about the murders "was to make a

deal...The deal on concurrent time. I was facing consecutive time. I just got found guilty for one armed robbery."

On cross-examination, however, Clay conceded that before he contacted the FBI on June 6, he received word that Willie Carter had raped or had attempted to rape the mother of his two-year-old son. Clay admitted that he was mad at Carter and wanted to get even. The state contended that this was Clay's motivation for inculpating himself and Carter in the murders.

A week or two after he spoke with Jennings about the murder, Clay was transferred to a federal prison. Clay testified that at this time he was assured by the FBI that the sentencing for his armed robbery conviction would

be postponed until he could provide them with all of the information that they needed on Switek. He believed that during this time the FBI would arrange for him to receive concurrent six-year prison sentences after he pled guilty to the second armed robbery conviction.

[page 4] After Clay had spoken to Jennings about the homicides, Jennings arranged for Clay to speak with two Chicago police officers involved in the homicide investigation. Clay repeated the information about the murders to the police officers. In his testimony, Clay conceded that the Chicago police read him his rights and told him that they could make no promises. Clay further testified that he made the statements to the police officers because Jennings

told him not to worry but just to cooperate with the state authorities and answer their questions. However in his testimony, Jennings denied telling Clay this.

Clay testified that on December 19, 1983 he was taken to the state's attorney's office to speak to the police officers again. At this time, one of the officers told him: "Look, this is what is happening. You are going to plead guilty to fourteen years. You are going to testify against anybody truthfully to the best of your ability or else we are going to start proceedings and indict you on Friday." Clay testified that when he asked the officers whether they had cleared that plan with the FBI, the officers swore at

him and told him the FBI had nothing to do with the deal being cut.

In December 1983, Clay was sentenced to nine years in prison for the first armed robbery conviction. On January 4, 1984, he pled guilty to the second armed robbery charge and was sentenced to a second nine year term to run concurrently. He testified that FBI agents did not speak on his behalf at either of the sentencing hearings.

Jennings testified at the hearing on the motion to suppress that he told Clay the first day they met that he could not make any promises regarding sentencing or penalties but that he could let state officials know that Clay was cooperating. Jennings further testified that on that first day, "when

we explained to him his cooperation, what I usually tell people, and we want you *[page 5]* to be fully cooperative as I did in this case. We want to know what you're doing. If you don't tell us everything and you are in fact running cocaine or selling bombs or doing whatever on the side and we find out about it we will fully prosecute you." When asked if that meant that Clay would not be prosecuted as long as he told the truth and was not caught doing anything wrong, Jennings answered, "That's correct and I said fully cooperate and tell us fully what you are involved in the past and not have anything jump up that you didn't tell us about; you can be prosecuted. This gets to the trial stage, we have you as a witness and you

didn't tell us about some crime you committed years ago you are going to be fully prosecuted for this."

Jennings further testified that Clay volunteered testimony about the triple murders in Chicago. He denied ever telling clay that he would attempt to get him minimum time if convicted of the armed robberies. He did admit, however, that Clay started to give information to the FBI after he was told that the FBI would tell the state he was helping.

Jennings denied that any plea bargaining occurred or that any promises were made. He testified that he advised Clay of his constitutional rights on June 13, 1983, before speaking with Clay about any murders. On cross-

examination, he conceded that it is standard bureau procedure to give Miranda warnings to anyone in custody. He also testified that he considered Clay's help to be cooperation. He testified that Clay was never told that he could be prosecuted for the drug activities about which he was giving information. However, Clay was told that he could be prosecuted for the murders of which he spoke.

Clay's attorney, Michael Goggins, testified at the hearing on the motion to suppress that Jennings did promise Clay, as well as Goggins, that he would inform prosecutors that the defendant was cooperating, but then failed to do so. Goggins further testified that Clay told him *[page 6]* that he had been

assured that he would not be charged with any crime about which he was telling the FBI.

After hearing the testimony, the trial court denied the motion to suppress. The trial court stated in its findings that Clay was told on several occasions that the FBI could make no promises or deals. The FBI, however, did tell Clay that they would advise the prosecutor of his cooperation if he did choose to cooperate. The trial court judge stated that: "There is no question in the court's mind that the prosecutors in Judge Gillis' courtroom were fully aware of the fat Mr. Clay was cooperating with the federal authorities."

The trial court found the

statements made by Clay to be voluntary because:

> while there might be an argument made that these statements were made by Mr. Clay to get a lesser sentence. There might also be an argument made that those statements were made by the defendant to get Mr. Switek and Mr. Carter, and I believe those in effect, were--was his tendency from the witness stand...There is no objective way that we can categorize what transpired here as plea negotiations or plea agreements or plea discussions. He was told time and time again that there were no deals, that the FBI could make no deals. The Chicago Police Department advised him at least one time...they could make no deals. He was admonished. He signed a waiver indicating that there were no deals. These discussions, in the court's mind cannot under any reading of the facts in this case be called plea negotiations.

On May 10, 1988, Clay was found guilty of the murder of the three individuals in Chicago. On June 27, 1988, he was sentenced to three

concurrent terms of 60 to 180 years in prison, Subsequently, Clay filed a motion seeking a new trial on grounds that new evidence had been discovered. The new evidence included a police report prepared by the Waukesha, Wisconsin police department regarding a phone conversation Waukesha police chief Richard Sader had with Jennings. The report states that Jennings had called Sader on June 7, 1983, the day after Clay had informed Jennings that he had information about the Wisconsin murder. *[page 7]* According to the report,. Jennings told the chief that "they had a black male in custody who they believed might be responsible for the murder of Ernest Kamrath..." The report went on to state that "this black male was in

the process of attempting to arrange a deal to lessen charges against him and in turn was to supply information as to the party or parties responsible for the Ernest Kamrath shooting."

The new evidence also included a transcript of the testimony given by Jennings at Clay's trial for the 1982 Wisconsin murder. At this trial, which took place after Clay was found guilty of the Chicago murders, Jennings was asked, "And did Roosevelt Clay indicate to you that he was trying to work out a deal to lessen charges and wanted your help?" Jennings responded, "Yes, sir."

After viewing all of the evidence, the trial court found that the new evidence would not have prompted the court to rule differently on the motion

to suppress. The trial court therefore denied the motion for new trial.

In a consolidated appeal, Clay challenged both the 1988 triple murder conviction and the ruling denying a new trial based on the newly discovered evidence. The appellate court affirmed the judgement of the trial court and found no abuse of discretion in its denial of Clay's motion for new trial. Clay sought rehearing, which was denied April 12, 1991. Clay then sought leave to appeal to the Illinois Supreme Court which was denied on October 2, 1991. After exhausting his state court remedies, Clay filed this petition for writ of habeas corpus. *[page 8]*

DISCUSSION

I. Admissibility of confession

Clay claims that his confession which inculpated him in the murders of the three individuals in Chicago was involuntary because it was made in reliance on the unfulfilled promise of Jennings that Clay would not be prosecuted. As such, Clay claims that the confession was admitted into evidence in violation of his Fourteenth Amendment right to due process of law, his Sixth Amendment right to counsel, and his Fifth Amendment right to not incriminate himself.

A confession is "involuntary" or "coerced" if the totality of the circumstances demonstrates that the confessor did not make the decision to confess of his own free will. Holland v. McGinnis, 963 F.2d 1044, 1050 (7th

Cir. 1991) (citing (Arizona v. Fulminante, 111 S.Ct. 1246, 1251-52 (1991)). A finding of coercion need not depend upon actual violence by a government agent; it can be mental as well as physical. Fulminante, 111 S. Ct. at 1253. Official misrepresentations made to the defendant may be constitutionally objectionable when the defendant is prevented from making a rational choice. This occurs when the misrepresentations distort the alternatives among which the defendant is being asked to choose. Weidner v. Thieret, 866 F.2d 958, 963 (7th Cir. 1989).

The ultimate issue of whether, under the totality of the circumstances, the confession was obtained in a manner

compatible with the requirements of the Constitution is a matter for independent federal determination. Miller v. Fenton, 474 U.S. 104, 112 (1985). As such, state court determinations concerning the ultimate question of whether the confession was voluntary are not binding in this federal habeas corpus proceeding. Id. at 111. However, subsidiary *[page 9]* factual findings of state courts are entitled to a presumption of correctness when supported by the record. Smith v. Fairman, 862 F.2d 630, 632 (7th Cir. 1988).

The trial court explicitly found that the defendant was told on several occasions that the FBI could make no promises or deals. The court further

found that there is "no objective way that we can categorize what transpired here as plea negotiations or plea agreements or plea discussions. [Clay] was told time and time again that there were no deals, that the FBI could make no deals..." Therefore, upon weighing the credibility of both Jennings and Clay, the trial court ultimately accepted the testimony of Jennings. The court therefore found that the FBI had informed Clay that it could not make any promises and that no plea agreements existed at the time Clay confessed to the murders.

The findings of the state court that the police did not engage in the intimidation tactics alleged by the defendant are findings of fact entitled

to a presumption of correctness. Miller, 474 U.S. at 112; Lavallee v. Delle Rose, 410 U.S. 690, 695 (1973) (per curiam). Moreover, this court has no license to redetermine the credibility of witnesses whose demeanor has been observed by state trial court but not by this court. Smith v. Cadagin, 902 F.2d 553 (7th Cir. 1990). Therefore, we find that plea negotiations were not underway at the time Clay confessed and that the FBI had not promised Clay that he would not be prosecuted.

Clay argues that the state court erred in relying on the testimony of Jennings at the suppression hearing because this testimony was shown to be false by the evidence which surfaced at

the Wisconsin trial. This evidence includes a police report prepared by the Waukesha, Wisconsin police department regarding a conversation that police chief Sader had with Jennings. The report states that Jennings had called Sader on June 7, 1983, the day after Clay had *[page 10]* informed Jennings that he had information about the Wisconsin murder. According to the report, Jennings told Sader that "they had a black male in custody who they believed might be responsible for the murder of Ernest Kamrath...," and that, "this black male was in the process of attempting to arrange a deal to lessen charges against him and in turn was to supply information as to the party or parties responsible for the Ernest

Kamrath shooting."

This evidence does not support Clay's claim that the FBI promised him that he would not be prosecuted for the murders. At the Wisconsin trial, Sader testified that he did not know what charges, if any, this black male had pending in Illinois. He also did not know of the other crimes in which this black male suspect was assisting the FBI. He was never told by Jennings that this suspect had been offered immunity nor that his information was off the record. In addition, Sader was not aware of any type of agreement between the B.B.I. and the law enforcement of Waukesha to give petitioner immunity for the Wisconsin murder. Therefore, the Waukesha police report, taken along with

testimony of Sader, in no way indicates that the FBI had promised Clay that he would not be prosecuted for the Chicago murders.

Clay also argues that the testimony of Jennings at the Wisconsin trial explicitly contradicts his testimony at the Chicago trial. At the Wisconsin trial, Jennings was asked, "did Roosevelt Clay indicate to you that he was trying to work out a deal to lessen charges and wanted your help?" Jennings responded, "Yes, sir."

The court finds that this testimony does not contradict the testimony of Jennings at the Chicago trial in which he denied promising Clay that he would not be prosecuted. Furthermore, this testimony does not contradict his

testimony that Clay was informed of his rights prior to confessing and that Clay chose to waive those rights. Rather, this testimony is consistent with *[page 11]* Jennings' prior testimony in which he admitted that Clay was seeking help on his armed robbery case -- help in the form of gathering exculpating evidence.

Therefore, upon examining the entire record, including the factual findings of the state court as well as the evidence that surfaced at the Wisconsin trial, we find that neither the FBI nor the Chicago police promised Clay that he would not be prosecuted for the Chicago murders. The confession made by Clay was therefore voluntary. Accordingly, this court denies the petition for writ of habeas corpus based

on Clay's claim that the confession was admitted in violation of his 14th Amendment right to due process of law, his 6th Amendment right to counsel, and this 5th Amendment right to be protected against self-incrimination.

II. Motion for New Trial

Clay claims that he was denied due process because the state trial court dismissed his motion for new trial based on newly discovered evidence that surfaced at the Wisconsin murder trial.

In a habeas petition, the petitioner must show a violation of the federal constitution in order to obtain relief. Bell v. Duckworth, 861 F.2d 169, 170 (7th Cir. 1988). When newly discovered evidence that bears on the constitutionality of the petitioner's

detention is alleged in a habeas application, the federal court must grant an evidentiary hearing if the evidence could not have reasonably been presented to the state trier of facts. Townsend v. Sain, 371 U.S. 293, 317 (1963). Here, the evidence in question does bear on the constitutionality of Clay's detention because it goes to the issue of whether the FBI did in fact promise Clay immunity from prosecution. Therefore, this court must examine the claim to determine whether the evidence *[page 12]* is in fact newly discovered and whether the petitioner received full and fair consideration in the state court on the issues. Id. at 313-14, 319.

Newly discovered evidence is

evidence which "the petitioner reasonably either did not know about...or could not have presented...at an earlier proceeding." United States ex rel. Shore v. O'Leary, 833 F.2d 663, 669 (7th Cir. 1987). Here, the evidence in question surfaced at the Wisconsin trial, which took place after Clay's trial in Chicago. However, Clay did present this evidence to the trial court after he filed his motion for a new trial. The trial court carefully examined this new evidence and denied the motion for a new trial. Therefore, the trial court did have an opportunity to review this evidence.

A federal evidentiary hearing is not necessary because Clay received full and fair consideration of this new

evidence in the state court. Where, as in this case, the state record provides all the necessary information for a satisfactory determination of the issues raised in the petition, then an evidentiary hearing is not required. Id. at 668. The state record includes all the necessary evidence to determine whether Clay's confession was involuntary, including both Jennings' testimony at the Wisconsin trial and the Waukesha police report. Therefore, a federal evidentiary hearing is not necessary.

A state trial court has discretion whether to grant or deny a new trial in a criminal case. Morgan v. Bronnenberg, 1991 WK 42870 at *2 (7th Cir. 1991). It is not the role of this court to

question the decision of the trial court to deny a motion for a new trial because new evidence would not effect *[sic.]* the outcome of the matter. As long as any rational trier of fact could have made such a decision based on the evidence presented, the decision of the trial court stands. United States ex. rel. Jones v. Washington, 836 F. Supp. 502, 507, n.2 (N.D.Ill. 1993).

We find that any rational trier of fact could have found Clay guilty of murder based on the evidence presented and that the newly discovered evidence would not have led to a different result. Accordingly, this court denies the petition based on the claim that the denial of the motion for a new trial resulted in a due process violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of habeas corpus is denied.

Wayne R. Andersen
United States District Judge

Dated: August 9, 1994